IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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| LIBERTY BELL CAPITAL II, L.P.<br>Plaintiff, | : | CIVIL ACTION |
| vs. | : | No. 13-CV-04241-BRM-TJB |
| WARREN HOSPITAL, WH MEMORIAL PARKWAY INVESTORS, L.L.C., WARREN HEALTH CARE ALLIANCE, P.C. and TWO RIVERS ENTERPRISES, INC.<br>Defendants. | : | Hearing Date: Dec. 19, 2016<br>Time: 10:00 a.m. |

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# DEFENDANTS, WARREN HOSPITAL, WH MEMORIAL PARKWAY INVESTORS, L.L.C., WARREN HEALTH CARE ALLIANCE, P.C. AND TWO RIVERS ENTERPRISES' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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# I. INTRODUCTION

On November 11, 2016, each of the parties in this case filed a Motion for Summary Judgment. Defendants oppose Plaintiff Liberty Bell Capital II, L.P.'s ("LBC") Motion ("LBC's Motion"), and this Memorandum is filed in support of that opposition. Some of the facts and evidence cited by Defendants, and arguments made by Defendants, in their Motion for Summary Judgment ("Defendants' Motion") are relevant to their opposition to LBC's Motion. Consequently, Defendants incorporate by reference Defendants' Motion, Defendants' Memorandum in Support of Their Motion for Summary Judgment ("Defendants' Memo"), Exhibits and Statement of Material Facts not in Dispute (ECF#s 68 and 69) into this response in opposition to LBC's Motion.

# II. COUNTER-STATEMENT OF THE FACTS

Defendants incorporate by reference the Statement of Facts as set forth in Defendants' Memo at 3-13.[1]

# III. ARGUMENT

In Plaintiff's Brief in Support of Its Motion for Summary Judgment ("LBC's Brief"), LBC provides its own unique interpretation of Judge Wolfson's

[1] As the result of including these eleven pages from Defendants' Memo into this Memo, the total number of pages remains within the page limit of Local Rule 7.2(b).

Opiniondenying Defendants' Motion to Dismiss the Amended Complaint,[2] argues that this interpretation is the law of the case, and then claims that there are undisputed facts which, based on Judge Wolfson's Opinion, require that summary judgment be entered in LBC's favor.

In seeking Summary Judgment, LBC argues that, in ruling on Defendants' Motion to Dismiss the Amended Complaint:

> Judge Wolfson held that if the Plaintiff established that "one of the purposes of the [Post Foreclosure] Agreement is that Defendants must take, or refrain from taking, certain actions in order to cooperate with Plaintiff in its goal of Obtaining[sic] title to the Property" that Defendants relinquishment of control of Hillcrest Medical Plaza LLC to InMed Investors, LLC for the purpose of depriving Plaintiff the right to procure title to the Property constitutes a breach of the Post Foreclosure Agreement.

LBC's Brief at 6. LBC claims that this interpretation of Judge Wolfson's Opinion is the law of the case and then argues that the undisputed facts show that a "purpose" of the Post-Foreclosure Agreement (the "PFA") was for Defendants to cooperate with LBC in LBC's effort to get title to the Property. Consequently, LBC argues, it is entitled to summary judgment. However, LBC is wrong in its interpretation of Judge Wolfson's Opinion, wrong on the law, wrong on the facts and wrong in its conclusion.

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[2] Judge Wolfson's Opinion denying Defendants' Motion to Dismiss the Amended Complaint (ECF#25) is referred to as "Opinion at [ ]." The Opinion is Exhibit I to LBC's Motion for Summary Judgment. The Exhibits to LBC's Motion are referred to as "LBC Ex. [ ]. The Exhibits to Defendants' Motion are referred to as "Defendants' Ex. [ ]."

First, Judge Wolfson's Opinion on the Motion to Dismiss is not the law of the case. Second, Judge Wolfson never said that if LBC proves that if one of the "purposes" of the PFA was for Defendants to cooperate with LBC in its effort to get title to the Property, then LBC wins. Third, there are no facts to support the conclusion that it was among the "purposes" of the PFA for Defendants to cooperate with LBC. To the contrary, the undisputed facts and admissions of LBC prove that it was never a purpose of the PFA to require Defendants to cooperate with LBC. Fourth, the term "purposes" is in a provision of the PFA that is operable **only if LBC requests** Defendants to take actions consistent with the "purposes" of the PFA. However, **LBC admitted that it never made a request of Defendants to act, or not to act, with regard to the purposes of the PFA**, and therefore this provision, and the meaning of the term "purposes" as used in the PFA, is irrelevant.

**a. Judge Wolfson's Opinion Denying Defendants' Motion to Dismiss Is Not the Law of this Case.**

Following Plaintiff's filing of an Amended Complaint, LBC Ex. N, asserting a claim for breach of contract, Defendants filed a Motion to Dismiss (ECF#18). On April 10, 2014, Judge Wolfson denied Defendants' Motion. In considering whether there is anything in Judge Wolfson's Opinion that can be considered to be the "law of the case", the Opinion must be viewed in light of the stage of the proceedings and the standard for review for a motion to dismiss, as it vastly differs from that of a motion for summary judgment.

In rendering a decision on a motion to dismiss, the court may dismiss a complaint for failure to state a claim upon which relief may be granted only if a Defendant is able to show that a complaint completely fails to contain sufficient fact allegations which, if accepted as true, would establish a claim to relief that is plausible on its face. *Connelly v. Lane Construction Corp*, 809 F.3d 780,786-87(3d Cir. 2016). For a complaint to be sufficient, the Federal Rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief" sufficient to "give the Defendant fair notice of what the…claim is and the grounds upon which it rests." *Id.* The court **must** then accept as true all possible facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *In Re: Asbestos Product Liability Litigation (VI),* 822 F.3d 125, 131 (3d Cir. 2016). Accordingly, the court only looks to the sufficiency of the pleading. The court accepts as true all allegations of fact alleged by the plaintiff, construes the complaint in the light most favorable to the plaintiff, and denies the motion to dismiss if under any reasonable reading of the complaint the plaintiff may be entitled to relief. *Id.*

A court's review in rendering a decision on a motion to dismiss is in stark contrast to the standard of review for a motion for summary judgment. In a motion for summary judgment, a party is entitled to entry of judgment only if the party can show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(b). Mere allegations are insufficient and only **evidence** sufficient to find all of the elements of the *prima facie* case merits consideration beyond the Rule 56 stage. *Blunt v. Lower Merion School District,* 767 F.3d 247 (3d Cir. 2014). The Supreme Court has explained the difference in the burden placed on the plaintiff to satisfy the pleading sufficiency requirement at the motion to dismiss stage as compared to the requirement of the existence of undisputed facts at the motion for summary judgment stage, as follows:

> At the pleading stage, general factual allegations of injury resulting from the Defendants' conduct may suffice, for on a Motion to Dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." In response to a Summary Judgment Motion, however, the Plaintiff can no longer rest on such "mere allegations" but must "set forth" by affidavit or other evidence specific facts, F.R.C.P 56(e), which for the purposes of the Summary Judgment Motion will be taken to be true. And at the final stage those facts (if controverted) must be "supported adequately by the evidence educed at trial."

*Lujan v. Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. at 2137 (internal citation omitted), citing *Wyoming v. Oklahoma,* 502 U.S. 437, 468-69, 112 S.Ct. 789, 807-08, 117 L.Ed.2d 1 (1992).

In rendering the Opinion denying Defendants' Motion to Dismiss, Judge Wolfson relied on the allegations in the Amended Complaint. Judge Wolfson observed that Plaintiff alleges in its Amended Complaint that:

> ...Plaintiff **alleges** under the terms of the Post-Foreclosure Agreement, Defendants were required to "take such actions in or with respect to the Foreclosure Proceeding, any Sheriff's Sale, or the Cash Collateral Actions as the Lender may reasonably request to effectuate the terms and provisions of and purposes of the Agreement."

Opinion at 7 (emphasis added). Judge Wolfson further observed that:

> ...Plaintiff **alleges** that it should have obtained title to the Property without any interference from Defendants. In that connection, Plaintiff **accuses** of Defendants orchestrating a plan to intentionally relinquish their ownership of Hillcrest to InMed, which allowed InMed-a non-party to the Post-Foreclosure Agreement-to exercise their right of redemption. Plaintiff **claims** that but for Defendant's actions relinquishing ownership in Hillcrest, which Plaintiff **argues** are contrary to the terms of their Agreement, Plaintiff would have obtained the benefit for which it bargained under the Agreement....

Opinion at 8. (emphasis added).

In reaching the decision on the Motion to Dismiss, the Court relied upon Plaintiff's contention that in reaction to being told that an agreement had been reached which would enable Hillcrest to redeem its Property:

> Plaintiff protested and insisted that Warren Hospital should move forward with the parties' Post-Foreclosure Agreement, and that Plaintiff, being the highest bidder, should obtain title to the property without any interference from Defendants.[3]

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[3] At the Rule 30(b)(6) deposition of LBC, LBC's designated witness testified that after being told that Hillcrest would likely redeem the Property, LBC did not ask

Opinion at 4. Based upon these allegations, which were accepted as true for the purpose of ruling on the Motion to Dismiss, the Court observed that:

> [A]t issue here is the wording of the Post-Foreclosure Agreement. Under section 2.1 of the Post-Foreclosure Agreement, "Warren Hospital Memorial and the Hospital Entities shall take such actions in or with respect to the Foreclosure Proceedings, and Sheriff's Sale, or the Cash Collateral Actions as the Lender [Liberty Bell] may reasonably request to effectuate the terms and provisions and purposes of this Agreement."

Opinion at 9. The Court then found that the term "purposes" was not defined in the PFA, and "...that **at this pleading state, Plaintiff has sufficiently alleged** that one of the purposes of the agreement is that Defendants must take, or refrain from taking, certain actions in order to cooperate with Plaintiff in its goal of obtaining title to the Property." (Opinion at 10, emphasis added). The Court then found "**[a]t the very least**, discovery should proceed on the issue whether the parties agreed and intended for the Post-Foreclosure Agreement to govern their respective obligations post sheriff's sale." Opinion at 10 (emphasis added).

Clearly, Judge Wolfson did not interpret the PFA. Her Honor held that any interpretation of the PFA must, at the very least, await discovery on what the parties intended by using the term "purposes" in the PFA. Judge Wolfson's

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anything of Defendants, contrary to this allegation in the Amended Complaint that Judge Wolfson relied on in reaching her decision. See, *infra*, at pp. 15-19.

Opinion addresses only the sufficiency of LBC's pleading, and did not make any rulings that can properly be considered to be "the law of the case."

It is because of these differences in deciding a motion to dismiss versus a motion for summary judgment that a motion to dismiss cannot establish the "law of the case" for purposes of a motion for summary judgment.

> The effect of the decisions on the Motions to Dismiss **cannot**, however, constitute law of the case and require that the Court grant FSQ's Motion for Summary Judgment. Unlike a motion to dismiss, a motion for summary judgment is entitled to no presumption that the facts as alleged are true. Rather in prosecuting a motion for summary judgment, the moving party must present admissible evidence to "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585 n. 10, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Horowitz v. Fed. Kemper Life Assurance Co.,* 57 F.3d 300, 302 n. 1 (3d Cir.1995).

*In re Integrated Health Servs., Inc.*, 358 B.R. 637, 641 (Bankr. D. Del. 2007) (emphasis added). See also, *State of New Jersey, New Jersey Dep't of Envtl. Prot. v. Cullen*, 424 N.J. Super. 566, 579, 39 A.3d 208, 216 (App. Div. 2012). The law is clear, a holding in a motion to dismiss does not establish the law of the case for purposes of a motion for summary judgment.

### b. LBC Misconstrues Judge Wolfson's Opinion – It Does Not Say What LBC Claims It Says

LBC has misconstrued the holding of Judge Wolfson in her Opinion denying Defendants' Motion to Dismiss the Amended Complaint. Specifically, LBC alleges in its Motion for Summary Judgment that the Court held that "...if the Plaintiff established that 'one of the purposes of the [Post Foreclosure] Agreement is that Defendants must take, or refrain from taking, certain actions in order to cooperate with Plaintiff in its goal of Obtaining [sic] title to the Property' that Defendants relinquishment of control of Hillcrest ... to InMed ... for the purpose of depriving Plaintiff the right to procure the Property constitutes a breach of the Post Foreclosure Agreement." (LBC's Brief at 6, citing the Opinion at 8-9). However, this is **not** what the Court held.

The issue before the Court on Defendants' Motion to Dismiss was whether the PFA addressed Defendants' conduct after the Sheriff's Sale of the Property. Relying on the allegations in the Amended Complaint, the Court held that the Amended Complaint sufficiently alleged a breach of the PFA. However, at no time did Judge Wolfson interpret the PFA, or provide her opinion on what facts were necessary to breach the PFA.

The only language addressing the issue of the "purposes" of the PFA is found on page 10 of the Opinion which observes that the term "purposes" is not defined and at the very least discovery should proceed on the issue of whether the parties agreed and intended for the PFA to govern their respective obligations post Sheriff's Sale. Specifically, the Court wrote

> I note that the term "purposes" is not defined in the Post-Foreclosure Agreement. Nonetheless, **at this pleading stage, Plaintiff has**

> **sufficiently alleged** that one of the purposes of the agreement is that Defendants must take, or refrain from taking, certain actions in order to cooperate with Plaintiff in its goal of obtaining title to the property. In that regard, **taking as true the allegations**, that Defendant relinquished control of Hillcrest to InMed for the purpose of depriving Plaintiff on the right to procure title to the Property, constitutes a breach of the Post-Foreclosure Agreement. At the very least, discovery should proceed on the issue whether the parties agreed and intended for the Post-Foreclosure Agreement to govern their respective obligations post share of sale.

(Opinion at 10, emphasis added). The Court relied upon the **allegations** of LBC regarding the meaning of the PFA. Judge Wolfson made no ruling on how the meaning of the term "purposes" impacts the meaning of the PFA. For the limited purpose of ruling on the Motion to Dismiss, Judge Wolfson accepted LBC's interpretation of the PFA, accepted as true the facts alleged by LBC, and merely held that these allegations were sufficient to sustain the Amended Complaint. Judge Wolfson did not hold that if LBC could prove that a purpose of the PFA was for Defendants to cooperate in LBC's effort to obtain title to the Property, that LBC then wins the case.

**c. The Undisputed Facts Do Not Prove that It Was a Purpose of the PFA to Require Defendants to Cooperate With LBC.**

**i. The PFA Is Clear on Its Face that It Does Not Require Defendants "To Provide All Cooperation Necessary to Effect [LBC's] Acquisition of the Property."**

Clearly, the parties have different interpretations of the PFA. LBC alleges that the PFA requires Defendants to "provide all cooperation necessary to effect

Liberty Bell's acquisition of the Property." Amended Complaint, ¶31, LBC Ex. N. Defendants argue that the PFA is to be read consistent with its clear and unambiguous terms:

> [Defendants] shall not contest, cause the stay of, or otherwise delay the Foreclosure Proceeding, any Sheriff's Sale or the Cash Collateral Actions. [Defendants] shall take such actions in or with respect to the Foreclosure Proceeding, any Sheriff's Sale, or the Cash Collateral Actions as [LBC] may reasonably request to effectuate the terms and provisions and purposes of this Agreement.

PFA §2.1., LBC Ex. A. The PFA says nothing about Defendants providing all cooperation necessary to effect Liberty Bell's acquisition of the Property. LBC claims that it is the mutual intent of the parties that the PFA be read so as to require Defendants to provide all cooperation necessary to LBC for it to obtain title to the Property. Consequently, in order to rule on LBC's Motion, the PFA must be interpreted.

Defendants agree that contract interpretation is largely a legal issue for the Court. A court's main task in interpreting a contract is to give effect to the parties' intentions at the time they entered into the agreement. *Tessmar v. Grosner*, 23 N.J. 193, 201 (1957). In attempting to discern the meaning of a provision in a contract, the plain language is the most direct route. *Zacarias v. Allstate Insurance Company,* 168 N.J. 590, 594-95, 775 A.2d 1262 (2001). When the language is clear, the inquiry must end. *Id.* In the absence of an ambiguity, the court cannot engage in a strained construction in order to support the imposition of liability or otherwise write a better contract. *Chubb Custom Insurance Company v. Prudential Insurance Company of America*, 195 N.J. 231, 238, 948 A.2d 1285, 1289 (2008). However, that is precisely what LBC is requesting: that the Court take the plain language of the PFA and create a different contract.

The pertinent principles of contract construction are straight forward. The court must make the determination of whether a contract, and the terms contained therein, are clear or ambiguous. *Nester v. O'Donnell*, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App. Div. 1997) (quoting *Kaufman v. Provident Life and Casualty Insurance Company,* 828 F. Supp. 275, 282 (D.N.J. 1992), Aff'd, 993 F. 2d 877 (3d Cir. 1993). In determining whether an ambiguity in a contract exists, the court must find that the terms of the contract are susceptible to at least two reasonable alternative interpretations. In order to determine the meaning of the terms of an agreement by objective manifestation of the party's intent, the terms of the contract must be given their plain and ordinary meaning. *Id.* The court is required to examine the document as a whole. *Id.* Moreover, a party that uses an unambiguous term in a contract cannot be relieved from the language simply because it had a secret, unexpressed intent that the language should have an interpretation different from the word's plain meaning. A party to a contract is bound by the apparent intention outwardly manifested to the other party. *Schor v. SMS Financial Corp.,* 357 N.J. Super. 185, 191, 814 A.2d 1108, 1112 (App. Div. 2002). As the New

Jersey Supreme Court has said, "In interpreting a contract, [i]t is not the real intent but the intent expressed or apparent in the writing that controls." *Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.*, 168 N.J. 124, 135, 773 A.2d 665 (2001)(citation omitted). The court should not consider an argument that "tortures the language" of a contract to create ambiguity where, fairly considered, none exists. *Stiefel v. Bayly, Martin & Fay of Conn. Inc.,* 242 N.J. Super. 643, 651, 577 A.2d 1303, 1308 (App. Div. 1990).

There is simply no ambiguity within the provisions of the PFA that are at issue. In arguing the existence of an ambiguity, LBC relies upon *Celanese v. Essex County,* 404 N.J. Super. 514, 962 A.2d. 591 (App. Div. 2009), but fails to note that the court found an ambiguity in the phrase "emanating from" and whether this term was used as a geographic descriptor or temporal descriptor. *Id.* at 527. Because of this internal ambiguity in the writing, the court looked to parol evidence.

Unlike in *Celanese*, there is no ambiguity within the PFA . The language is clear. The only obligation of the Defendants was that "WH Memorial and the Hospital Entities shall not contest, cause the stay of, or otherwise delay the Foreclosure Preceding, any Sheriff's Sale, or the Cash Collateral Actions. WH Memorial and the Hospital Entities must take such action in or with respect to the Foreclosure Proceeding and Sheriff's Sale or the Cash Collateral action as the lender [Liberty Bell] may reasonably request to effectuate the terms and provisions and purposes of this agreement." The Court permitted discovery to take place to determine the purpose of the agreement because LBC had *alleged* that one of the purposes agreed upon by the parties was to ensure that Liberty Bell acquired title.

LBC cites two cases for the proposition that because the PFA allegedly requires cooperation in one regard, it then requires cooperation in all regards. However, that is not what these cases stand for.

LBC contends that *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 (3d Cir. 1992) stands for the proposition that "a contract provision requiring a party's cooperation was properly read to require that party to continue to cooperate until the purpose of the contract had been achieved." LBC Brief at 13. In *Fineman*, the Court found that defendant Armstrong had a continuing obligation not to "undo" that which it promised to do it in the settlement agreement based on a reading that rendered the settlement agreement meaningless. Here, there is no issue as to what the Defendants promised to do: not to "contest, cause the stay of, or otherwise delay the Foreclosure Preceding, any Sheriff's Sale, or the Cash Collateral Actions" or "take such action in or with respect to the Foreclosure Proceeding and Sheriff's Sale or the Cash Collateral action as the lender [Liberty Bell] may reasonably request to effectuate the terms and provisions and purposes of this agreement." Defendants are not trying to undo that which they agreed to do. To the contrary, LBC is attempting to create an obligation that does not exist.

LBC likewise relies on *Moran v. Fifteenth Ward Bldg. & Loan Ass'n*, 131 N.J. Eq. 361 (N.J. Ch. 1942) for the proposition that the court would not interpret property deeds in a manner that would be at odds with the reasonable intention of the parties. However, *Moran* stands for the proposition that a contract should be read to achieve the mutual intent of the parties and not to achieve an absurd result. Here, there is no evidence that it was the mutual intent of the parties that Defendants cooperate with LBC in all regards in LBC's effort to obtain title to the Property.

These cases are inapposite, and do not require the Court to read the PFA as LBC does. To the contrary, in looking to the clear and plain meaning of §2.1 of the PFA, it cannot fairly be concluded that it was the parties' mutual intent that Defendants were required to cooperate with LBC in its effort to obtain title to the Property, any more than what is specifically set forth in the PFA.

**ii. The Undisputed Facts Prove that LBC Never Requested Defendants Do Anything to Effectuate the Purposes of the PFA, and Therefore Did Not Breach the PFA.**

LBC argues that the use of the term "purposes" in §2.1 of the PFA provides the context in which the entirety of §2.1 must be interpreted. However, the term "purposes" has a very limited application in §2.1 of the PFA. The sentence in which the term "purposes" is used states:

> [Defendants] shall take such actions in or with respect to the Foreclosure Proceedings, and Sheriff's Sale, or the Cash Collateral Actions **as [Liberty**

> **Bell] may reasonably request to effectuate the** terms and provisions and **purposes** of this Agreement.

PFA §2.1 (emphasis added). Based on the clear meaning of this sentence, the term "purposes" comes into play if, and only if, LBC asks Defendants (1) to take some action; (2) the action requested is "…in or with respect to the Foreclosure Proceedings, Sheriff's Sale, or the Cash Collateral Actions…"; and (3) the action requested must be "…to effectuate…the purposes of this Agreement." If no request is ever made by LBC of Defendants to take any action with respect to the Foreclosure Proceedings, Sheriff's Sale or Cash Collateral Actions, then this provision in the PFA has not been breached, and the meaning of the term "purposes" is irrelevant with regard to the allegations in this case.

The undisputed deposition testimony proves that LBC never requested that the Defendants do anything "…to effectuate the terms and provisions and purposes of [the PFA]." John Giangiulio, who was LBC's designated representative pursuant to Rule 30(b)(6), Fed. R. Civ. P., testified as to what actions Defendants were requested to take when LBC first learned that Hillcrest was likely to redeem its Property. On December 7, 2011, one day before the expiration of the ten day redemption period, Defendants and their counsel telephoned LBC and its counsel and informed them that the InMed Litigation was going to be settled and the Property was going to be redeemed. As LBC's principal Mr. Giangiulio testified:

Q. Okay. Just as best as you can recollect, what did Mr. Silverang [Defendants' counsel] tell you?
A. Mr. Silverang opened up the conversation, and that overall call was, you know, fairly short. And Mr. Silverang said, wouldn't you guys be happy getting paid off? And at this point I had already asked our counsel to really not say anything on this call, that we should really just do more listening. And I believe I spoke up and said, Well, what do you mean? What are you talking about? And Mr. Silverang said in a slightly different way, Well, you guys bought your loan at a discount. Wouldn't you be happy getting paid off on your loan? And I think at that point Mr. Silverang expanded and shared with us that the hospital had the opportunity to resolve its litigation with InMed. At that moment he didn't describe for us exactly how that was going to be resolved.
Q. What happened next?
A. Well, essentially Bill Peruzzi [an LBC principal] responded something like, well, it sounds like you guys are in a pretty tough spot, because we had our post foreclosure agreement with them and they are trying to settle a negotiation. We felt that our post foreclosure agreement was an agreement for them to not take any action that would impede our foreclosure proceedings. And I can say the call ended with this, I spoke up and said, I can't tell you what your legal obligations are; you have your counsel here, because Silverang was on the phone, and he's the counsel for the hospital, but let me be clear, we want the property. And that is how the call ended.

. . . . . . . . . .

Q. Is there anything more that you recall about the telephone call and who said what than what you just relayed - - related? Excuse me.
A. No. It - - as I said earlier, it was really short and to-the-point call with no - - involvement from my counsel through speaking, because I specifically asked them not to, let's do more listening. But overall the call was very businesslike and very short.

. . . . . . . . . .

Q. Was there any discussion about InMed's or Hillcrest's ability to redeem?

> A. Only the inference that was made by Mr. Silverang, will you be happy just getting paid off; that would have been inferred that we were going to have a redemption event.
> Q. Was there any discussion about the defendant's [sic] obligations under the Post-Foreclosure Agreement during this phone call?
> A. We did not give counsel to Warren Hospital. They had their attorney on the phone. It's his role, not ours.
> Q. So the answer to my question is?
> A. We did not speak of their obligation in the Post-Foreclosure Agreement, what we thought their obligations were.

Deposition Testimony of John Giangiulio, pp. 241-245.[4] Now knowing that Hillcrest was going to redeem the Property, and knowing that this could only happen if Defendant WHMPI transferred its interest in Hillcrest to InMed, here's what LBC asked Defendants to do to effectuate the purposes of the PFA:

> **Q. Did anyone on behalf of Liberty Bell make any requests of Warren Hospital or the entities during this phone call?**
> **A. Uhm, we took it that they obviously had some concerns about what their allegations were and that's why they made the call to us, but we did not specifically bring anything else up to them in that call.**
> **Q. You didn't make any request that they do this or do that or not do this or not do that?**
> **A. No.**

Id. at p. 246 (emphasis added). Consequently, LBC admitted that no request was made by LBC of the Defendants to do anything "… to effectuate the terms and provisions and purposes of this [PFA]."[5]

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[4] These additional pages of the Deposition of John Giangiulio are appended to Defendants' Memo as Exhibit 34.

[5] This testimony directly contradicts LBC's claim that after this phone call, "Liberty Bell protested and immediately informed Silverang and Sblendorio that

Additionally, in their Affidavits in support of Defendants' Motion for Summary Judgment, Warren Hospital's in-house counsel Mark Sblendorio, and Warren Hospital's outside counsel Kevin Silverang stated:

> LBC never requested WH Memorial or the Hospital Entities, as defined in the PFA, or the Hospital, to take any actions to effectuate the terms, provisions or purposes of the PFA.

Defendants' Exs. 25 and 26. Therefore, because LBC never requested that Defendants take any actions to effectuate the purposes of the PFA, the meaning of the term "purposes" is irrelevant to LBC's breach of contract claim.

**d. The Evidence that LBC Relies on Does Not Support It's Argument for Summary Judgment**

**i. LBC's Reliance on Four Contracts to Which No Defendant Is a Party Is Misplaced**

In its Brief, LBC argues that Defendants' alleged breach of four contracts related to the bank loan[6] (the "Debt Contracts") that was in default "… are important for two reasons: first, because the Defendants violated each agreement by transferring their interest in Hillcrest to InMed; and second, because these

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Liberty Bell wanted to move forward with the Post-Foreclosure Agreement and obtain title to the property." Liberty Bell stated to Silverang and Sblendorio, in clear and unambiguous terms, that Liberty Bell wanted to obtain title to the Property." Amended Complaint ¶44, LBC Ex. N. Judge Wolfson relied upon this false allegation in denying Defendants' Motion to Dismiss. Opinion at 4.

[6] These agreements are the Mortgage and Security Agreement, dated September 5, 2003 (LBC Exhibit F); the Letter of Credit and Security Agreement, dated September 5, 2004 (LBC Exhibit C); and two Forbearance Agreements, dated June 2, 2010 and August 3, 2010 (LBC Exhibits E-1 and E-2).

related agreements are helpful in interpreting the Post Foreclosure Agreement…." LBC Brief at 2, 22-26. LBC's arguments make no sense. Not a single Defendant is a party to any one of these four Debt Contracts.

It is axiomatic as a basic principle of contract law that a person cannot breach an agreement to which that person is not a party. The obligations that LBC relies on in the Debt Contracts that were supposedly breached simply do not apply to any of the Defendants.

The core issue in this case is the interpretation of the PFA. LBC provides not authority for the proposition that the Debt Contracts, entered into by third parties years before the PFA, are a proper source of evidence of the parties' mutual intent in entering into the PFA. By November 2, 2011, the day the PFA was entered into, the Forbearance Agreements had expired under their own terms. The judgment in the foreclosure action had already been entered. Accordingly, all four of the Debt Contracts were null and void as they had fully terminated.

Additionally, the PFA has an integration clause that provides, in part, that the PFA is "… the sole, final and entire agreement of the parties with respect to the subject matter hereof … and may not be … varied by evidence of prior, contemporaneous, or subsequent … agreements …." PFA §5.6, LBC Ex. A.

Consequently, the Debt Contracts are irrelevant to the mutual intent of the parties in entering into the PFA.

### ii. The Remaining Evidence that LBC Relies on In Support of Its' Motion for Summary Judgment Is Irrelevant to the Parties' Mutual Intent in Entering into the PFA

The remaining evidence that LBC relies upon in support of its Motion for Summary Judgment does not support its suggested interpretation of the PFA. LBC's Brief at pp. 1, 2-3, 11-12, 15-20, 22-26. There is nothing in any of the documents or testimony cited by LBC that tends to prove that it was the mutual intent of the parties in entering into the PFA for Defendants to cooperate with LBC's efforts to obtain title to the Property, or not to interfere with these efforts.

Defendants do not deny that they understood at the time that the PFA was signed that LBC wanted to get title to the Property, that LBC had purchased the Debt in August 2011 in an effort to gain title to the Property, or that, once LBC purchased the Debt, it was likely that LBC would eventually get title to the Property. Defendants do not deny that they understood that as the result of WHMPI transferring its interest in Hillcrest to InMed that Hillcrest was going to redeem if InMed came up with the money. However, all of this is irrelevant. Just because Defendants knew that LBC wanted to get title to the Property does not mean that Defendants agreed in the PFA to help LBC get title to the Property. Defendants agreed to what is in the PFA, and the PFA says nothing about Defendants cooperating with LBC.

In support of its argument that it was the parties' mutual intent that Defendants be obligated to assist LBC in its effort to acquire title to the Property, LBC cites to a variety of evidence, none of which makes it more or less likely that this was the mutual intent of the parties. Therefore, this evidence is not relevant.

LBC cites to evidence of the value of the Property, but does not explain what this evidence has to do with the meaning of the PFA. LBC Brief at 3, 15-16. Defendants supposed valuations of the Property have no relevance to the parties' shared intent in entering into the PFA. Even if Defendants did not inform LBC of their plan to settle the InMed Litigation (which they did) and transfer WHMPI's interest in Hillcrest to InMed, *Id.* at 3, 16-17, it is irrelevant to the mutual intent of the parties regarding §2.1 of the PFA that was entered into a month earlier. Evidence that Defendants' counsel asked LBC not to communicate with InMed's counsel while the InMed Litigation was ongoing, *Id.* at 17, does not tend to make it more or less likely that the parties had a mutual intent to obligate Defendants to cooperate with LBC as LBC saw fit. LBC argues that §5.1 of the PFA shows that the parties intended the PFA to apply after the Sheriff's Sale, *Id.* at 3, but neglects to mention that this provision is meant to apply to the new leases required by the St. Luke's Definitive Agreement that are the most important part of the PFA. Even if the PFA was intended to apply after the Sheriff's Sale, this is irrelevant to the parties' mutual intent in entering into the PFA. LBC claims that this was a high risk venture by LBC, thereby requiring a higher rate of return on its investment. *Id.* at 15-16. This has nothing to do with the parties' mutual intent with regard to the PFA. LBC also references that the InMed settlement agreement contemplates that LBC may sue InMed or the Defendants. *Id.* at 3, 21; LBC Ex. D. However, again, this has no probative value as to the mutual intent of the parties in entering into the PFA.

LBC points to a Declaration by LBC's John Giangiulio submitted by Defendants on September 25, 2011, in opposition to a motion by InMed to intervene in the foreclosure action and delay the Sheriff's Sale, **weeks before the PFA was signed.** *Id.* at 17-19; LBC Ex. K. LBC argues that this Certification evidences the parties' mutual intent in entering into the PFA. *Id.* The Certification provides reasons why LBC, as the owner of a defaulted loan, wants the Sheriff's Sale to proceed without further delay. The Certification states that LBC wanted to obtain title to the Property, but knew there were several impediments, including Hillcrest's right of redemption. There is nothing in this Certification that is relevant to the parties' mutual intent in entering into the PFA five weeks later to satisfy the conditions of the St. Luke's Definitive Agreement. LBC Ex. B.

LBC's evidence does not make it more or less likely that it was the parties mutual intent to obligate Defendants to assist LBC in its efforts to acquire title to the Property. LBC has presented no evidence upon which it can fairly be concluded that the parties' mutual intent in entering into the PFA was anything more or different from what is clearly stated in §2.1 of the PFA.

**e. It Was the Parties' Mutual Intent that the PFA's "No Contest" Provision Means Exactly What It Says**

Contrary to LBC's arguments in support of its interpretation of §2.1 of the PFA, there is substantial admissible, probative evidence, including admissions by LBC, that the mutual intent of the parties in entering into the PFA was for Defendants to do exactly what §2.1 obligated them to do, and no more or less. This evidence, and the conclusions to be drawn from this evidence, is thoroughly discussed in Defendants' Memo in support of its Motion for Summary Judgment at 19-32.

**f. The Doctrine of Judicial Estoppel Is Not Applicable to Any of the Defendants' Arguments as the Defendants Have Not Taken Inconsistent Legal Positions in the Foreclosure Action or this Action**

LBC argues that Defendants are barred by the doctrine of judicial estoppel from disputing that one of the purposes of the PFA was to allow LBC to acquire title to the Property based on the allegation that Defendants have taken an inconsistent position in prior litigation. LBC Brief at 26-28. However, Defendants did not take legal positions in the mortgage foreclosure action that are inconsistent with Defendants' legal positions in this case. Certainly, Defendants have not acted in bad faith. Therefore, there is no basis for the application of the doctrine of judicial estoppel to any of Defendants' positions in this case.

Judicial estoppel is a judge made doctrine that seeks to prevent parties from playing "fast and loose with the courts." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,* 81 F. 3d 355, 358 (3d Cir. 1996) (citations omitted). A two part test is used to determine whether judicial estoppel applies: (1) is the position the party is taking inconsistent with a position previously asserted; and (2) if so, did the party assert either or both of the inconsistent positions in bad faith? *National Util. Serv. Inc. v. Chesapeake Corp.,* 45 F. Supp. 2d 438, 445 (D. NJ. 1999). An inconsistent position alone does not trigger the doctrine; intentional self-contradiction must be used to obtain an unfair advantage. *Id.*

Some of the factors considered when a court looks at the application of judicial estoppel include: whether a party's later position is clearly inconsistent with its' earlier position; whether the party was successful in persuading the court to adopt that position so that acceptance of the inconsistent position would pose a threat to judicial integrity; and, whether the party advancing an inconsistent position would derive an unfair advantage if not estopped. *New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

LBC bases its argument for the application of judicial estoppel on certain documents submitted to the Superior Court by Defendants in the foreclosure action in which LBC claims Defendants articulate positions that are inconsistent with Defendants' positions in this case. In late September 2011, InMed filed an application with the Superior Court seeking to intervene in the foreclosure action and to delay the Sheriff's Sale of the Property. In opposition to the application, Defendants submitted a Letter Brief with the Superior Court, LBC Ex. J., along with the Certification of John Giangiulio, one of LBC's principals. LBC Ex. K. In the Certification, Giangiulio states, among other things, that it was LBC's desire to obtain the Property at the Sheriff's Sale, that LBC purchased the Debt in reliance on the Superior Court having previously denied InMed's attempts to intervene in the mortgage foreclosure action,[7] and when LBC obtained title to the Property it would invest capital in the Property to increase its value. *Id.* LBC argues that statements made in the Giangiulio Certification contradict Defendants' positions in this case. LBC is wrong.

Defendants' position in this case rests on the meaning of §2.1 of the PFA, which did not even exist when the Giangiulio Certification was submitted to the Superior Court. The Giangiulio Certification states that it was LBC's position that

[7] In the Introduction to its Brief, LBC states that Defendants "...argued in the Superior Court that Liberty Bell entered into the Post Foreclosure Agreement to acquire the Property." LBC Brief at 3. The only proceeding in the Superior Court that took place after the PFA was entered into on November 2, 2011, was an attempt to stay the Sheriff's Sale filed by InMed on November 21, 2011, which concluded on November 28, 2011 when the motion was denied. With regard to this proceeding, Defendants never made any argument as alleged by LBCF, either in writing or orally, to the Superior Court. See, Defendants' Exs. 16 and 20.

it wanted to obtain title to the Property as the result of the foreclosure proceeding as soon as possible. Defendants saw no reason for delay, or for InMed to intervene in the action.

There is nothing inconsistent between the statements in the Giangiulio Certification and the Defendants' position in this case that they were only obligated to not ". . . contest, cause the stay of or otherwise delay the Foreclosure Proceeding, any Sheriff's Sale or the Cash Collateral Actions." Contrary to what LBC claims, Defendants never took the position "that LBC had no expectation of acquiring the property." LBC Brief at 28. To the contrary, in Defendants' Memo (ECF#68), Defendants acknowledge that LBC hoped to acquire title to the Property. Defendants' Memo at 2.[8] Defendants have not taken any position in the prior foreclosure action that is clearly inconsistent with its current positions in this action.

Further, the Superior Court's ruling on InMed's application was not based on anything that Giangiulio said in his Certification. LBC Ex. M. The Superior Court denied InMed's application because it had no standing, and because WHMPI, the managing member of Hillcrest, could adequately represent Hillcrest's interests in the foreclosure action. Defendants' Ex. 20.

Lastly, LBC presents no evidence of Defendants' bad faith.

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[8] "...LBC purchased the Debt from the bank at a substantial discount. LBC hoped to acquire title to the Property as the result of the ongoing foreclosure process."

Consequently, the legal principle of judicial estoppel does not bar Defendants from making any of the arguments that it makes in this case.

## IV. CONCLUSION

For all the reasons stated herein, Plaintiff's Motion for Summary Judgment should be denied.

Respectfully,

*/s/Norman E. Greenspan*

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Dated: December 5, 2016